

**Amendment Number 1**  
**to**  
**Contract Number DIR-SDD-536**  
**between**  
**State of Texas, acting by and through its Department of Information Resources,**  
**and**  
**International Business Machines Corporation**

This Amendment Number 1 (this "Amendment") to Contract Number DIR-SDD-536 (the "Contract") is between the State of Texas, acting by and through its Department of Information Resources ("DIR"), and International Business Machines Corporation ("Vendor") and effective the last date signed by either party. Initial capitalized terms are as defined in the Contract. DIR and Vendor agree to modify the terms and conditions of the Contract as follows:

1. **Contract, Section 1C, Order of Precedence**, is hereby restated in its entirety as follows:

**C. Order of Precedence**

This Contract; Appendix A, "Standard Terms and Conditions For Services Contracts"; Appendix B, "Vendor's Historically Underutilized Businesses Subcontracting Plan"; Appendix C, "Services and Pricing Addendum"; Appendix D, "Sample Supplemental Agreement"; Exhibit 1 to Appendix D - the Alternate Appendix D, "IBM Statement of Work", Exhibit 1, "Vendor's Response to RFO DIR-SDD-TMP-091", including all addenda; and Exhibit 2, "RFO DIR-SDD-TMP-091", including all addenda; are incorporated by reference into the Contract and constitute the entire agreement between DIR and Vendor. In the event of a conflict between the documents listed in this paragraph, the controlling document shall be this Contract, then Appendix A, then Appendix B, then Appendix C, then Appendix D or Exhibit 1 to Appendix D - the Alternate Appendix D, then Exhibit 1, and finally Exhibit 2. In the event and to the extent any provisions contained in multiple documents address the same or substantially the same subject matter but do not actually conflict, the more recent provisions shall be deemed to have superseded earlier provisions.

2. **Contract, Section 8, Authorized Exceptions to Appendix A, Standard Terms and Conditions for Product and Related Services Contracts, Subsection K, revising** Appendix A, Section 7, Vendor Responsibilities, Subsection A., Indemnification, is hereby updated to include at the end of subsection K2) "Patents and Copyrights" the following:

5. If applicable to this SOW, the voice over internet protocol (VoIP) system and/or customer premises equipment (CPE) contain the following 911/E911 calling limitations:
  - a) In some circumstances, Customer will not be able to place 911/E911 calls using the system and any associated CPE. Examples of such circumstances are broadband or electrical outage, moving the telephone adapter to a location where 911 service is not available, or use of a non-native number;
  - b) 911 calls placed from CPE may not provide extension specific information to the Public Safety Answering Point, such as identification of the particular extension from which the 911 call is placed or the building, floor or office number of the location from which the 911 call is placed; and

- c) 911 calls placed from a location other than Customer's address of record for service may indicate to the emergency responders that the call originated from Customer's address of record, and not Customer's calling location.

Customer agrees that:

- i. Customer will inform users of the limitations stated above and have an appropriate alternative means of making a 911 calls such as a traditional telephone or wireless phone in lieu of the CPE; and
- ii. Vendor shall bear no responsibility or liability to Customer associated with the 911/E911 limitations described in this Section.
- iii. Vendor does not operate as a provider of services regulated by the Federal Communications Commission (FCC) or state regulatory authorities (State Regulators), and does not intend to provide any services which are regulated by the FCC or State Regulators.
- iv. If the FCC or any State Regulator imposes regulatory requirements or obligations on any of the products or services provided by Vendor hereunder Vendor may:
  - (A) at Customer's expense modify, replace or substitute products; and/or
  - (B) change the way in which such services are provided to Customer to avoid the application of such requirements or obligations to Vendor (e.g., by acting as Customer's agent for acquiring such services from a third party common carrier.

- 3. **Contract, Section 8, Authorized Exceptions to Appendix A, Standard Terms and Conditions for Product and Related Services Contracts**, is hereby updated to include the following:

T. All references to Catalog Information System Vendors (CISV) are hereby deleted.

U. All references to Texas Building and Procurement Commission (TBPC) are hereby revised and replaced with Texas Comptroller of Public Accounts (a/k/a CPA).

- 4. **Appendix A, Section 2, Definitions, A. Customer**, is hereby restated in its entirety as follows:

**A. Customer** - any Texas state agency, unit of local government, institution of higher education as defined in Section 2054.003, Texas Government Code, and those state agencies purchasing from a DIR contract through an Interagency Agreement, as authorized by Chapter 771, Texas Government Code, any local government as authorized through the Interlocal Cooperation Act, Chapter 791, Texas Government Code, and the state agencies and political subdivisions of other states as authorized by Section 2054.0565, Texas Government Code and, except for telecommunications services under Chapter 2170, Texas Government Code, assistance organizations as defined in Section 2175.001, Texas Government Code to mean:

- 1) A non-profit organization that provides educational, health or human services or assistance to homeless individuals;
- 2) A nonprofit food bank that solicits, warehouses, and redistributes edible but unmarketable food to an agency that feeds needy families and individuals;

- 3) Texas Partners of the Americas, a registered agency with the Advisory Committee on Voluntary Foreign Aid, with the approval of the Partners of the Alliance Office of the Agency for International Development;
- 4) A group, including a faith-based group, that enters into a financial or non-financial agreement with a health or human services agency to provide services to that agency's clients;
- 5) A local workforce development board created under Section 2308.253;
- 6) A nonprofit organization approved by the Supreme Court of Texas that provides free legal services for low-income households in civil matters;
- 7) The Texas Boll Weevil Eradication Foundation, Inc., or an entity designated by the commissioner of agriculture as the foundation's successor entity under Section 74.1011, Texas Agriculture Code;
- 8) A nonprofit computer bank that solicits, stores, refurbishes and redistributes used computer equipment to public school students and their families; and
- 9) A nonprofit organization that provides affordable housing.

5. **Appendix A, Section 7, Vendor Responsibilities, A, Indemnification**, is hereby restated in its entirety as follows:

#### **A. Indemnification**

##### **1) Acts or Omissions**

Vendor shall indemnify and hold harmless the State of Texas and Customers, AND/OR THEIR OFFICERS, AGENTS, EMPLOYEES, REPRESENTATIVES OR ASSIGNEES (collectively "**Texas Indemnified Parties**" or individually a "**Texas Indemnified Party**") FROM AND AGAINST ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS (collectively, "Claims"), AND ALL RELATED REASONABLE ACTUAL COSTS, ATTORNEYS' FEES, AND EXPENSES that a court finally awards or that are included in a settlement approved in writing by Vendor arising out of, or resulting from any acts or omissions of the Vendor or its agents, employees or subcontractors in the execution or performance of the Contract and any Purchase Orders issued under the Contract that result in (a) damages for bodily injury (including death) and damage to real property and tangible personal property, or (b) the amount of any other actual direct damages, up to the greater of \$100,000 or the charges (if recurring, 12 months' charges apply) for the Product or Service that is the subject of the claim, except to the extent caused by the negligence, gross negligence or intentional misconduct of any Texas Indemnified Party. The limit above also applies to any of Vendor's subcontractors and Program developers. It is the maximum for which Vendor and its subcontractors are collectively responsible.

##### **2) Defense and Settlements**

With regard to Claims for which Vendor is obligated to indemnify and defend a Texas Indemnified Party under subsections 1) or 3) of this Section A1,

(a) the parties' defense counsel shall obtain the consent of the Texas Indemnified Party, before entering into any settlements of Claims that require the Texas Indemnified Party to admit liability, cease using any Product provided by Vendor under this Contract or make a payment to the third party,

(b) VENDOR SHALL BE LIABLE TO PAY ALL REASONABLE ACTUAL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES.,

(c) THE DEFENSE OF CLAIMS SHALL BE COORDINATED BY VENDOR WITH THE OFFICE OF THE ATTORNEY GENERAL WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND VENDOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL, and

(d) VENDOR AND THE CUSTOMER AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.

### **3) Infringements: Patents and Copyrights**

#### **a) Indemnity**

Vendor shall indemnify and hold harmless the State of Texas Indemnified Party from any and all third party claims, costs, damages and reasonable actual attorneys' fees that a court finally awards or that are included in a settlement approved in writing by Vendor that any Product that Vendor provides a Texas Indemnified Party infringes such third party's United States patents or copyrights in connection with the PERFORMANCES OR ACTIONS OF VENDOR PURSUANT TO THIS CONTRACT, provided that Customer promptly notifies Vendor in writing of the claim. The limits in this Contract also apply to any of Vendor's subcontractors and Program developers. It is the maximum for which Vendor and its subcontractors are collectively responsible. For purposes of this section, the term "Product" includes Materials, Machine Code and LIC.

#### **b) Remedies**

If Vendor becomes aware of an actual or potential claim, or Customer provides Vendor with notice of an actual or potential claim, Vendor may (or in the case of an injunction against Customer, shall), at Vendor's sole option and expense obtain rights to permit Vendor to enable DIR or the applicable Customer (as used herein collectively "Customer") to continue to use the Product, or to modify it, or replace it with one that is at least functionally equivalent. If Vendor determines that none of these alternatives is reasonably available, Customer agrees to promptly return the Product to Vendor on Vendor's written request. Vendor will then give Customer a credit equal to:

1. for a Machine, your net book value provided Customer has followed generally-accepted accounting principles;
2. for a Vendor Program (as defined in this Agreement), the amount paid by Customer or 12 months' charges (whichever is less); and
3. for Materials, the amount Customer paid Vendor for the creation of the Materials.

This is Vendor's entire obligation to Customer regarding any claim of infringement.

#### **c) Claims for Which Vendor is Not Responsible**

Vendor has no obligation regarding any claim based on any of the following:

1. anything Customer provides which is incorporated into a Product or Vendor's compliance with any designs, specifications, or instructions provided by Customer or by a third party on Customer's behalf;
2. Customer' modification of a Product, or a Vendor Program's use in other than its Specified Operating Environment;
3. the combination, operation, or use of a Product with other products not provided by Vendor as a system, or the combination, operation or use of a Product with any product, data, apparatus, or business method that Vendor did not provide, or the

distribution, operation or use of a Product for the benefit of a third party outside Customer's Enterprise; or

4. infringement by a non-Vendor Product or a third party's program alone.

#### **4) Limitations.**

Under no circumstances is Vendor, its subcontractors, or its Program developers liable for any of the following: (a) third-party claims against the Texas Indemnified Party for damages (other than those under items A.1.1)(a) and (b) above); (b) loss of, or damage to, the Customer's records or data; or (c) special, incidental, or indirect damages or for any economic consequential damages (including lost profits or savings), even if Contractor is informed of their possibility.

#### **5) Independent Contractor**

**VENDOR AGREES AND ACKNOWLEDGES THAT DURING THE EXISTENCE OF THIS CONTRACT, IT IS FURNISHING SERVICES IN THE CAPACITY OF AN INDEPENDENT CONTRACTOR AND THAT VENDOR IS NOT AN EMPLOYEE OF THE CUSTOMER, DIR OR THE STATE OF TEXAS.**

6. **Appendix A, Section 7, Vendor Responsibilities, N. Taxes/Worker's Compensation / Unemployment Insurance**, is hereby added as follows:

#### **N. TAXES/WORKER'S COMPENSATION / UNEMPLOYMENT INSURANCE**

1) VENDOR AGREES AND ACKNOWLEDGES THAT DURING THE EXISTENCE OF THIS CONTRACT, VENDOR SHALL BE ENTIRELY RESPONSIBLE FOR THE LIABILITY AND PAYMENT OF VENDOR'S AND VENDOR'S EMPLOYEES' TAXES OF WHATEVER KIND, ARISING OUT OF THE PERFORMANCES IN THIS CONTRACT. VENDOR AGREES TO COMPLY WITH ALL STATE AND FEDERAL LAWS APPLICABLE TO ANY SUCH PERSONS, INCLUDING LAWS REGARDING WAGES, TAXES, INSURANCE, AND WORKERS' COMPENSATION. VENDOR AGREES AND ACKNOWLEDGES THAT VENDOR ITS EMPLOYEES, REPRESENTATIVES, AGENTS OR SUBCONTRACTORS SHALL NOT BE ENTITLED TO ANY STATE BENEFIT OR BENEFIT OF ANOTHER GOVERNMENTAL ENTITY CUSTOMER. THE CUSTOMER AND/OR THE STATE SHALL NOT BE LIABLE TO THE VENDOR ITS EMPLOYEES, AGENTS, OR OTHERS FOR THE PAYMENT OF TAXES OR THE PROVISION OF UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION OR ANY BENEFIT AVAILABLE TO A STATE EMPLOYEE OR EMPLOYEE OF ANOTHER GOVERNMENTAL ENTITY CUSTOMER.

2) VENDOR AGREES TO INDEMNIFY AND HOLD HARMLESS CUSTOMERS, THE STATE OF TEXAS AND/OR THEIR EMPLOYEES OR AGENTS (COLLECTIVELY "TEXAS INDEMNIFIED PARTIES" AND INDIVIDUALLY A "TEXAS INDEMNIFIED PARTY") FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, INCLUDING ATTORNEYS' FEES, RELATING TO TAX LIABILITY, UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION OR EXPECTATIONS OF BENEFITS BY VENDOR, ITS EMPLOYEES, REPRESENTATIVES, AGENTS OR

SUBCONTRACTORS IN ITS PERFORMANCE UNDER THIS CONTRACT. VENDOR SHALL BE LIABLE TO PAY ALL REASONABLE ACTUAL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY VENDOR WITH THE OFFICE OF THE ATTORNEY GENERAL FOR THE TEXAS INDEMNIFIED PARTY WHEN TEXAS STATE AGENCIES ARE NAMED DEFENDANTS IN ANY LAWSUIT AND VENDOR MAY NOT AGREE TO ANY SETTLEMENT WITHOUT FIRST OBTAINING THE CONCURRENCE FROM THE OFFICE OF THE ATTORNEY GENERAL. VENDOR AND THE CUSTOMER AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM.

7. **Appendix C, Product and Pricing Index**, is hereby replaced in its entirety with the restated Appendix C, Product and Pricing Index as attached to this Amendment Number 1.
8. **Appendix D, Sample Supplemental Agreement**, is hereby updated to include Exhibit 1 to Appendix D – Alternate Appendix D, IBM Statement of Work as attached to this Amendment Number 1.
9. All other terms and conditions of the Contract as amended, not specifically modified herein, shall remain in full force and effect. In the event of conflict among the provisions, the order of precedence shall be this Amendment Number 1 and then the Contract.

**IN WITNESS WHEREOF**, the parties hereby execute this Amendment to be effective as of the date of the last party to sign.

<b>International Business Machines Corporation</b>	<b>The State of Texas, acting by and through the Department of Information Resources</b>
--	--

By: signature on file_____	By: signature on file_____
----------------------------	----------------------------

Name: Ronald E. Wilt_____	Name: <u>Cindy Reed</u> Deputy Executive Director
---------------------------	--

Title: Client Unit Director_____	Title: <u>Operations &amp; Statewide Technology Sourcing</u>
----------------------------------	--

Date: 5/23/08_____	Date: 5/21/08_____
--------------------	--------------------

Legal: 5/21/08\_\_\_\_\_